

AMENDED IN ASSEMBLY AUGUST 25, 2005

AMENDED IN ASSEMBLY JULY 7, 2005

AMENDED IN SENATE APRIL 5, 2005

AMENDED IN SENATE MARCH 16, 2005

SENATE BILL

No. 138

**Introduced by Senator Maldonado
(Principal coauthor: Senator Alquist)**

February 2, 2005

An act to amend Section 1347 of the Penal Code, relating to criminal procedure.

LEGISLATIVE COUNSEL'S DIGEST

SB 138, as amended, Maldonado. Criminal procedure: closed-circuit testimony.

Under existing law, in any criminal proceeding the court may order that the testimony of a child 13 years of age or younger be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant or defendants, and attorneys, and communicated to the courtroom by means of 2-way or one-way closed-circuit television if the court makes certain findings. Those findings include that the minor's testimony will involve a recitation of the facts of either an alleged sexual offense committed on the minor or a violent felony of which the minor is a victim, and that the minor witness would be unavailable to testify due to the impact of specified threats, defense conduct, or circumstances of the crime but for the closed-circuit procedure. Existing law specifies the persons that may be physically present for the closed-circuit testimony.

This bill would expand these provisions to apply to cases involving specified child abuse and endangerment charges. It would also permit a court, when a defendant has been charged with a child abuse or sex offense specified in these provisions, to order that the testimony of a child victim 13 years of age or younger be taken by means of a closed-circuit television as specified in this law if the court determines that (1) testimony by the minor in the presence of the defendant would result in the child suffering serious emotional distress so that the child would be unavailable as a witness, or (2) the child would be unavailable as a witness for specified reasons. The bill would add ~~the prosecuting and defense attorneys, and any technicians necessary to operate the equipment; to the persons who may be physically present for the closed-circuit testimony, other than a defense attorney who has behaved during the hearing or trial in a way that caused the minor to be unable to continue his or her testimony.~~

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1347 of the Penal Code is amended to
2 read:

3 1347. (a) It is the intent of the Legislature in enacting this
4 section to provide the court with discretion to employ alternative
5 court procedures to protect the rights of a child witness, the rights
6 of the defendant, and the integrity of the judicial process. In
7 exercising its discretion, the court necessarily will be required to
8 balance the rights of the defendant or defendants against the need
9 to protect a child witness and to preserve the integrity of the
10 court's truthfinding function. This discretion is intended to be
11 used selectively when the facts and circumstances in the
12 individual case present compelling evidence of the need to use
13 these alternative procedures.

14 (b) Notwithstanding any other law, the court in any criminal
15 proceeding, upon written notice by the prosecutor made at least
16 three days prior to the date of the preliminary hearing or trial date
17 on which the testimony of the minor is scheduled, or during the
18 course of the proceeding on the court's own motion, may order
19 that the testimony of a minor 13 years of age or younger at the
20 time of the motion be taken by contemporaneous examination

1 and cross-examination in another place and out of the presence of
2 the judge, jury, ~~and~~ defendant or defendants, *and attorneys*, and
3 communicated to the courtroom by means of closed-circuit
4 television, if the court makes all of the following findings:

5 (1) The minor's testimony will involve a recitation of the facts
6 of any of the following:

7 (A) An alleged sexual offense committed on or with the
8 minor.

9 (B) An alleged violent felony, as defined in subdivision (c) of
10 Section 667.5, of which the minor is a victim.

11 (C) An alleged felony offense specified in Section 273a or
12 273d of which the minor is a victim.

13 (2) The impact on the minor of one or more of the factors
14 enumerated in subparagraphs (A) to (E), inclusive, is shown by
15 clear and convincing evidence to be so substantial as to make the
16 minor unavailable as a witness unless closed-circuit testimony is
17 used.

18 (A) Testimony by the minor in the presence of the defendant
19 would result in the child suffering serious emotional distress so
20 that the child would be unavailable as a witness.

21 (B) The defendant used a deadly weapon in the commission of
22 the offense.

23 (C) The defendant threatened serious bodily injury to the child
24 or the child's family, threatened incarceration or deportation of
25 the child or a member of the child's family, threatened removal
26 of the child from the child's family, or threatened the dissolution
27 of the child's family in order to prevent or dissuade the minor
28 from attending or giving testimony at any trial or court
29 proceeding, or to prevent the minor from reporting the alleged
30 sexual offense, or from assisting in criminal prosecution.

31 (D) The defendant inflicted great bodily injury upon the child
32 in the commission of the offense.

33 (E) The defendant or his or her counsel behaved during the
34 hearing or trial in a way that caused the minor to be unable to
35 continue his or her testimony.

36 In making the determination required by this section, the court
37 shall consider the age of the minor, the relationship between the
38 minor and the defendant or defendants, any handicap or disability
39 of the minor, and the nature of the acts charged. The minor's
40 refusal to testify shall not alone constitute sufficient evidence that

1 the special procedure described in this section is necessary to
2 obtain the minor's testimony.

3 (3) The equipment available for use of closed-circuit television
4 would accurately communicate the image and demeanor of the
5 minor to the judge, jury, defendant or defendants, and attorneys.

6 (c) If the court orders the use of closed-circuit television,
7 two-way closed-circuit television shall be used, except that if the
8 impact on the minor of one or more of the factors enumerated in
9 subparagraphs (A) to (E), inclusive, of paragraph (2) of
10 subdivision (b), is shown by clear and convincing evidence to be
11 so substantial as to make the minor unavailable as a witness even
12 if two-way closed-circuit television is used, one-way
13 closed-circuit television may be used. The prosecution shall give
14 the defendant or defendants at least 30 days' written notice of the
15 prosecution's intent to seek the use of one-way closed-circuit
16 television, unless good cause is shown to the court why this
17 30-day notice requirement should not apply.

18 (d) (1) The hearing on a motion brought pursuant to this
19 section shall be conducted out of the presence of the jury.

20 (2) Notwithstanding Section 804 of the Evidence Code or any
21 other law, the court, in determining the merits of the motion,
22 shall not compel the minor to testify at the hearing; nor shall the
23 court deny the motion on the ground that the minor has not
24 testified.

25 (3) In determining whether the impact on an individual child
26 of one or more of the five factors enumerated in paragraph (2) of
27 subdivision (b) is so substantial that the minor is unavailable as a
28 witness unless two-way or one-way closed-circuit television is
29 used, the court may question the minor in chambers, or at some
30 other comfortable place other than the courtroom, on the record
31 for a reasonable period of time with the support person, the
32 prosecutor, and defense counsel present. The defendant or
33 defendants shall not be present. The court shall conduct the
34 questioning of the minor and shall not permit the prosecutor or
35 defense counsel to examine the minor. The prosecutor and
36 defense counsel shall be permitted to submit proposed questions
37 to the court prior to the session in chambers. Defense counsel
38 shall be afforded a reasonable opportunity to consult with the
39 defendant or defendants prior to the conclusion of the session in
40 chambers.

1 (e) When the court orders the testimony of a minor to be taken
2 in another place outside of the courtroom, the court shall do all of
3 the following:

4 (1) Make a brief statement on the record, outside of the
5 presence of the jury, of the reasons in support of its order. While
6 the statement need not include traditional findings of fact, the
7 reasons shall be set forth with sufficient specificity to permit
8 meaningful review and to demonstrate that discretion was
9 exercised in a careful, reasonable, and equitable manner.

10 (2) Instruct the members of the jury that they are to draw no
11 inferences from the use of closed-circuit television as a means of
12 facilitating the testimony of the minor.

13 (3) Instruct respective counsel, outside of the presence of the
14 jury, that they are to make no comment during the course of the
15 trial on the use of closed-circuit television procedures.

16 (4) Instruct the support witness, outside of the presence of the
17 jury, that he or she is not to coach, cue, or in any way influence
18 or attempt to influence the testimony of the minor.

19 (5) Order that a complete record of the examination of the
20 minor, including the images and voices of all persons who in any
21 way participate in the examination, be made and preserved on
22 videotape in addition to being stenographically recorded. The
23 videotape shall be transmitted to the clerk of the court in which
24 the action is pending and shall be made available for viewing to
25 the prosecuting attorney, the defendant or defendants, and his or
26 her attorney during ordinary business hours. The videotape shall
27 be destroyed after five years have elapsed from the date of entry
28 of judgment. If an appeal is filed, the tape shall not be destroyed
29 until a final judgment on appeal has been ordered. Any videotape
30 that is taken pursuant to this section is subject to a protective
31 order of the court for the purpose of protecting the privacy of the
32 witness. This subdivision does not affect the provisions of
33 subdivision (b) of Section 868.7.

34 (f) When the court orders the testimony of a minor to be taken
35 in another place outside the courtroom, only the minor, a support
36 person designated pursuant to Section 868.5, a nonuniformed
37 ~~bailiff, the prosecuting attorney, the defense attorney provided he~~
38 ~~or she has not behaved during the hearing or trial in a way that~~
39 ~~caused the minor to be unable to continue his or her testimony;~~
40 ~~bailiff~~ any technicians necessary to operate the closed-circuit

1 equipment, and, after consultation with the prosecution and the
2 defense, a representative appointed by the court, shall be
3 physically present for the testimony. A videotape shall record the
4 image of the minor and his or her testimony, and a separate
5 videotape shall record the image of the support person.

6 (g) When the court orders the testimony of a minor to be taken
7 in another place outside the courtroom, the minor shall be
8 brought into the judge's chambers prior to the taking of his or her
9 testimony to meet for a reasonable period of time with the judge,
10 the prosecutor, and defense counsel. A support person for the
11 minor shall also be present. This meeting shall be for the purpose
12 of explaining the court process to the child and to allow the
13 attorneys an opportunity to establish rapport with the child to
14 facilitate later questioning by closed-circuit television. No
15 participant shall discuss the defendant or defendants or any of the
16 facts of the case with the minor during this meeting.

17 (h) When the court orders the testimony of a minor to be taken
18 in another place outside the courtroom, nothing in this section
19 prohibits the court from ordering the minor to be brought into the
20 courtroom for a limited purpose, including the identification of
21 the defendant or defendants as the court deems necessary.

22 (i) The examination shall be under oath, and the defendant or
23 defendants shall be able to see and hear the minor witness, and if
24 two-way closed-circuit television is used, the defendant's image
25 shall be transmitted live to the witness.

26 (j) Nothing in this section affects the disqualification of
27 witnesses pursuant to Section 701 of the Evidence Code.

28 (k) The cost of examination by contemporaneous
29 closed-circuit television ordered pursuant to this section shall be
30 borne by the court out of its existing budget.

31 (l) Nothing in this section shall be construed to prohibit a
32 defendant from being represented by counsel during any
33 closed-circuit testimony.